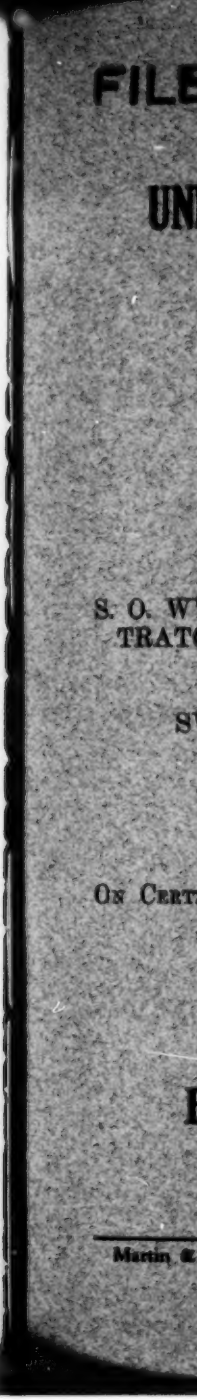
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IN THE

UNITED STATES SUPREME COURT

October Term, 1929.

No. 510.

WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, *et al.*

v.

SWANSON CHEMICAL CORPORATION.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief for Appellee Below

n & Lyle, 302 Penfield Bldg., Phila., Pa.

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IN THE
SUPREME COURT OF THE UNITED STATES.
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No. 510.

S. O. WYNNE, FEDERAL PROHIBITION ADMINISTRATOR FOR EASTERN PENNSYLVANIA, *et al.*,
v.
SWANSON CHEMICAL CORPORATION.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE BELOW.

OPINION BELOW.

The opinion of the District Court is not reported. A copy thereof will be found in an appendix to this brief (p. 15).

JURISDICTION.

This case is here on certificate under Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

In this case the Circuit Court of Appeals certifies the following questions:

1. Is denatured alcohol, during its manufacture and preparation for the market, "liquor" within the meaning of Sections 1 and 6, Title II, of the National Prohibition Act, the latter of which provides that permits to manufacture "liquor" may be issued for only one year?

If the answer to this question be in the negative, the Court asks:

2. Does the provision of Section 6, Title II, of the National Prohibition Act, which directs that every permit "shall designate and limit the * * * time when" the authorized acts may be performed, apply to a permit to operate a denaturing plant, *i.e.*, to use alcohol in the manufacture of denatured alcohol?

If the answer to the first question be in the negative and the answer to the second be in the affirmative, then the Court asks:

3. Does a provision in a permit that it shall be in force until "surrendered by the holder or canceled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," comply with the above-mentioned requirement of Section 6 of Title II of the National Prohibition Act, that every permit "shall designate and limit the * * * time when" the authorized acts may be performed?

If the first question be answered in the negative and if the second and third questions be answered in the affirmative, then the Court further asks:

4. May a permit to operate a denaturing plant, which permit provides that it shall be in force "until surrendered by the holder or canceled by the Commissioner of Internal

Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," be terminated by a general regulation providing that all such permits shall expire on a date named?

STATUTES INVOLVED.

The statutory provisions and the regulations, together with a history thereof, involved in this case, are set forth in an appendix to this brief (pp. 12-15).

SUMMARY OF ARGUMENT.

Permits to manufacture denatured alcohol are not permits to manufacture "liquor" within the meaning of Section 1 of Title II of the National Prohibition Act.

It necessarily follows that permits to manufacture denatured alcohol may be issued for a period longer than one year because the limitation provided in Section 6 of Title II of the National Prohibition Act that certain permits may be issued for one year applies to liquor permits only. The obtaining of "liquor" to be used in the manufacture of denatured alcohol is covered by the issuance of permits to purchase, as provided for in Section 6 of Title II of the National Prohibition Act. These purchase permits, as a matter of law, expire thirty days after the date of their issuance.

A provision in a permit to operate a denaturing plant to the effect that the permit shall be in force "until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," satisfies the requirements of Section 6, Title II, which provides that "every permit shall designate and limit the acts that are permitted and the time when and place where such acts may be performed."

A permit for the manufacture of denatured alcohol, which authorizes the operation of the denaturing plant "until surrendered by the holder or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," may not be terminated by a general regulation providing that all such permits shall expire on a date named, because Section 9 of Title II of the National Prohibition Act provides the procedure under which permits may be terminated.

ARGUMENT.

I.

DURING ITS MANUFACTURE AND PREPARATION FOR THE MARKET "DENATURED ALCOHOL" IS NOT "LIQUOR" WITHIN THE MEANING OF SECTIONS 1 AND 6, TITLE II, OF THE NATIONAL PROHIBITION ACT.

Section 1 of Title II of the National Prohibition Act defines "liquor," or the phrase "intoxicating liquor," to include all alcoholic compounds, by whatever name called, containing one-half of one per cent or more of alcohol by volume which are "fit for use for beverage purposes."

The position taken by the appellants below is that the phrase "fit for use for beverage purposes" not only includes compounds which can immediately be used as a beverage, but all other compounds which may be made fit for beverage purposes by some manipulation after preparation for the market.

From the reading of Section 4 of Title II of the National Prohibition Act, it must be concluded that the position taken by the appellants below is not sound.

First of all, we find that denatured alcohol is referred to in said Section as an "article" and not as "liquor" or "intoxicating liquor." If Congress had intended that de-

natured alcohol, or any other compound containing one-half of one per cent or more of alcohol by volume, which is unfit for beverage purposes, should come within the definition of "liquor" as defined in Section 1 of Title II of the National Prohibition Act, it would not have used the word "article" in said Section 4 of Title II of the Act. Throughout the entire Act it may be noted that Congress carefully used the word "liquor" only when it intended to refer to such products as are fit for immediate beverage purposes. This is borne out by referring to Section 6 of Title II, where it is provided as follows:

> "All permits to manufacture, prescribe, sell or transport liquor may be issued for one year and shall expire on the 31st day of December next succeeding the issuance thereof * * *"

and then in the same section it is further provided as follows:

> "In the event of the refusal by the Commissioner of *any application for a permit,* (our italics) the applicant may have a review of his decision before a Court of Equity in the manner provided in Section 5 hereof."

It is to be noted that in the first instance "liquor" permits are referred to and in the second instance applications for any permits are referred to. The reason for this is that Congress clearly intended that liquor permits should expire annually, and yet it intended that the applicant for any permit should have the right to a review of the decision made by the Commissioner, regardless of whether the application is for a liquor permit or for a permit to manufacture any of the articles enumerated in Section 4 of Title II of the National Prohibition Act.

See *Higgins v. Foster,* 12 F. (2d) 646.

If the argument of appellants below is tenable, then it would not have been necessary for Congress to have specifically mentioned in some of the sub-divisions of Section 4 of Title II of the National Prohibition Act that the products therein referred to must be unfit for use for beverage

purposes. For instance, paragraph C of Section 4, provides that:

> "Patented, patent and proprietary medicines that are *unfit for use for beverage purposes* (our italics) after having been manufactured and prepared for the market shall not be subject to the provisions of the Act."

yet further on in the same section Congress provided that

> "Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of one per centum of alcohol by volume in which any extract, syrup or other article is used as an ingredient, shall be subject to the penalties provided in Section 29 of this Title * * * "

It can, therefore, be readily seen that although the articles which are mentioned in sub-divisions b, c and d of Section 4, Title II, of the Act, can only be manufactured on condition that they are unfit for use for beverage purposes, and therefore could not possibly come within the definition of the word "liquor" in Section 1 of Title II, yet Congress anticipated that some of these articles likely could be made fit for beverage purposes, or might be even used in their original state for beverage purposes, because a penalty is provided for such use in the section itself.

Certainly the appellants below could not argue that any of the articles mentioned in sub-divisions b, c and d could be classed as "liquor," as defined in Section 1 of Title II, yet, as heretofore stated, Congress clearly anticipated that these very articles which by the limitations placed upon them could not possibly be classed as "liquor" within the meaning of the Act, could, after being prepared for the market, be used, either after manipulation or in their actual state, as beverages.

The contention of the appellants below that any "article" mentioned in Section 4 of Title II of the Act, which could, after manufacture, be used as a beverage after some manipulation, would bring the article within the meaning of the word "liquor" as defined in Section 1, Title II, of the Act, must fall.

The appellants below further take the position that the "articles" mentioned in Section 4 are not excluded from the provisions of the Act at the time of manufacture, and that they remain within the Act until "prepared for the market." In a sense this is clearly true. It is true that alcohol must be purchased and possessed by a manufacturer of denatured alcohol in order to obtain the same for denaturation, but Section 6 of the Title II does not provide that permits to purchase shall expire on the 31st day of December next succeeding the issuance thereof. On the contrary, with regard to permits to purchase "liquor," it provides as follows:

> "That permits to purchase liquor for the purpose of manufacturing or selling, as provided in this Act, shall not be in force to exceed ninety days from the date of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days."

Appellants below overlook the fact that before alcohol may be purchased by the appellee below for the purpose of denaturation, applications for permits to purchase must be made and that these permits expire at the end of thirty days from the date of their issuance. These purchase permits are unquestionably "liquor" permits as defined in Section 1, Title II, of the Act. It can, therefore, be readily seen that the handling of the alcohol prior to its denaturation is covered by these permits to purchase.

Further proof of the fact that Congress intended that the "articles" mentioned in Section 4 of Title II should not be classed as "liquor" is evidenced by the fact that Section 6 of Title II provides, *inter alia*, as follows:

> "Every permit shall be in writing, dated when issued, and signed by the Commissioner or his author-

ized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed."

It has already been noted that Section 6 of Title II prescribes the time limit for which so-called "liquor" permits may be issued. Why then should Congress later in the same section provide that, "*every permit* (our italics) shall designate and limit the time"? This further clearly shows that Congress intended that permits for the manufacture of "articles" mentioned in Section 4 of Title II might be issued for a longer period than a year.

II.

A PROVISION IN A PERMIT AUTHORIZING THE OPERATION OF A DENATURING PLANT THAT THE PERMIT WILL BE IN EFFECT "UNTIL SURRENDERED BY THE HOLDER OR CANCELLED BY THE COMMISSIONER FOR VIOLATION OF THE NATIONAL PROHIBITION ACT OR REGULATIONS MADE PURSUANT THERETO" IS A VALID PROVISION AND SATISFIES THE REQUIREMENTS OF SECTION 6, TITLE II, REQUIRING THAT ALL PERMITS SHALL DESIGNATE THE TIME WHEN THE ACTS THEREUNDER MAY BE PERFORMED.

Wherever Congress intended to fix a measured duration of a permit it did so expressly. By referring to Section 6 of Title II, we find that all permits except those for the manufacture of the "articles" mentioned in Section 4 of Title II are specifically limited. If Congress had intended that permits for the manufacture of the "articles" mentioned in Section 4 of Title II should be specifically limited as to time it would have expressly provided therefor as it did with regard to all other permits.

It is submitted that the provision in the permit itself which provides that it shall be in effect "until surrendered

or cancelled by the Commissioner of Internal Revenue for violation of the National Prohibition Act or regulations made pursuant thereto," answers the requirements of the Act.

See *Lyon Laboratories, Inc., et al., v. Campbell,* 34 F. (2d) 642.

III.

A PERMIT TO OPERATE A DENATURING PLANT WHICH PROVIDES THAT IT SHALL BE IN FORCE "UNTIL SURRENDERED BY THE HOLDER OR CANCELLED BY THE COMMISSIONER OF INTERNAL REVENUE FOR VIOLATION OF THE NATIONAL PROHIBITION ACT OR REGULATIONS MADE PURSUANT THERETO" CANNOT BE TERMINATED BY A GENERAL REGULATION PROVIDING THAT ALL SUCH PERMITS SHALL EXPIRE ON A DATE NAMED.

The regulation limiting the duration of permits for the manufacture and sale of "articles" enumerated in Section 4 of Title II of the National Prohibition Act when such permits have originally been issued to be held until surrendered or revoked for violation is in effect a revocation of such a permit without first proceeding as provided in Section 9 of Title II of the National Prohibition Act.

See *Weste v. Campbell,* 21 F. (2d) 771, wherein the Court said (page 771) as follows:

> "(1) My impression of the case is that the Prohibition Acts, The Volstead and its amendments (27 USCA) purport to contain reasonably complete provisions as to the regulative and administrative features of them, and that regulations promulgated by the Department under the authority of the law must, of course, conform to the general principle that they can enforce, explain, and apply the law; they can never modify or remake it, and must always be in conformity with it; that it appears from Section 9, Title II of the

Act (27 USCA 21), that permits were recognized as held under a qualified title, the fundamental basis of which was the good faith, the compliance by the permittee with the provisions of law controlling the disposition, the handling, and use of alcohol.

(2) Under that section provision is made for the revocation of a permit of any person who is found guilty of either wilfully violating any of the prohibition laws, or who has not in good faith conformed to the provisions of the Act; and that a reasonable construction of that section in accordance with the spirit, intent, and purpose of the Act would authorize a revocation without proof of a specific violation of a specific statute or regulation, where the proof established wilful connivance with or cooperation in a deliberate attempt to evade or violate a provision of the law, I have no doubt.

So construed, Section 9 is comprehensive enough to cover, and at the same time protect, every good faith and honest permittee, and to have stripped of protection any permittee who operates outside of the bona fides.

(3) That being so, I am of the opinion that a permit once granted cannot be revoked or suspended or nullified either temporarily or permanently without a substantial compliance with the provisions of Section 9, and that no regulation can be promulgated which would have such an effect."

See also *Higgins v. Foster*, 12 F. (2d) 646, wherein the Court said (page 648), as follows:

"As Section 9 of Title II prescribed that the delinquent must have 15 days' notice and be served with a statement of the facts on which he was to suffer revocation, it applied to the plaintiff, if we are right, and the regulation of November 14, 1925, denied him a right which the statute gave him. We need hardly add that this conclusion depends in no sense upon any vested right which he had in his permit, but only upon such limitations as were created by the statute itself.

While the case is entirely open on the merits to the Commissioner, and while we agree that there was ground for revocation, we do not see our way clear to affirm the defendant's action in the face of the method by which it was accomplished. The permit still remains in force, and the plaintiff is entitled under Section 9 to an injunction until it has been forfeited in due form of law."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the questions certified to this Honorable Court by the Circuit Court of Appeals should be answered in the following manner:

(1) The second and third questions should be answered in the affirmative.

(2) The first and fourth questions should be answered in the negative.

Respectfully submitted,

MICHAEL SERODY,
Attorney for Appellee below.

APPENDIX.

The National Prohibition Act, c. 85, 41 Stat. 305:

TITLE II.

Sec. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *

Sec. 4. The articles enumerated in this section shall not, after having been manufactured and prepared for the market, be subject to the provisions of this Act if they correspond with the following descriptions and limitations, namely:

(a) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.

(b) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.

(c) Patented, patent and proprietary medicines that are unfit for use for beverage purposes.

(d) Toilet, medicinal and antiseptic preparations and solutions that are unfit for use for beverage purposes.

(e) Flavoring extracts and syrups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(f) Vinegar and preserved sweet cider.

A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this Act and as directed by the commissioner. No such manufacturer shall sell, use or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, syrup or the articles named in paragraphs b, c and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, syrup, or other article is used as an ingredient, shall be subject to the penalties provided in Section 29 of this Title.

Sec. 6. No one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the commissioner so to do, except * * *

All permits to manufacture, prescribe, sell or transport liquor, may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof: Provided, That the commissioner may without formal application or new bond extend any permit granted under this

Act or laws now in force after August 31 in any year to December 31 of the succeeding year: Provided further, That permits to purchase liquor for the purpose of manufacturing or selling as provided in this Act shall not be in force to exceed ninety days from the day of issuance. A permit to purchase liquor for any other purpose shall not be in force to exceed thirty days. Permits to purchase liquor shall specify the quantity and kind to be purchased and the purpose for which it is to be used. No permit shall be issued to any person who within one year prior to the application therefor or issuance thereof shall have violated the terms of any permit issued under this Title or any law of the United States or of any State regulating traffic in liquor.

No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a duly licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession. Every permit shall be in writing, dated when issued, and signed by the commissioner or his authorized agent. It shall give the name and address of the person to whom it is issued and shall designate and limit the acts that are permitted and the time when and place where such acts may be performed. No permit shall be issued until a verified, written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used.

Sec. 9. If at any time there shall be filed with the commissioner a complaint under oath setting forth facts showing, or if the commissioner has reason to believe, that any person who has a permit is not in good faith conforming to the provisions of this Act, or has violated the laws of any State relating to intoxicating liquor, the commissioner or his agent shall immediately issue an order citing such person to appear before him on a day named * * * at which

time a hearing shall be had unless continued for cause. * * * If it be found that such person has been guilty of wilfully violating any such laws, as charged, or has not in good faith conformed to the provisions of this Act, such permit shall be revoked, and no permit shall be granted to such person within one year thereafter. * * * (U. S. C., Title 27, Sec. 21.)

IN THE
DISTRICT COURT OF THE UNITED STATES.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SITTING IN EQUITY

No. 4895. December Term, 1928. Bill for Review.

SWANSON CHEMICAL CORPORATION
v.
JAMES M. DORAN, *et al.*

OPINION SUR TRIAL HEARING ON PLEADINGS AND PROOFS.

DICKINSON, J.:

This case began as a motion for a preliminary injunction. The hearing was by stipulation expanded to one on final decree. The underlying question is that which, so

far as this Court is concerned, has been answered in the case of Del Mar Manufacturing and Chemical Company v. Doran, *et al.*, which was heard at the same time as the instant case. The defendants differentiate this from the Del Mar case, in that the plaintiff here holds a permit, not for an alcoholic non-beverage product, but a "liquor" permit, in that it may sell either or both alcohol or alcohol as a denatured product. There is, of course, a difference in fact between the manufacture of an alcoholic non-potable product, in the manufacture of which denatured alcohol is an ingredient, and a manufacture of denatured alcohol itself. There would not seem, however, to be any difference in the permit classification because both are listed among "articles" enumerated in Section 4 of Title II of the National Prohibition Act.

The two classes of products, if they may be called such, would thus seem to have the like permit. A differentiation, it is true, is made between the first four "articles" and the remaining two, but this differentiation is for a wholly different purpose than that of permit regulation. It is likewise true that this differentiation is based upon the fact difference that the "articles" enumerated in the first four classifications may readily be made potable. The truth remains, however, that a manufacturer of denatured alcohol and a manufacturer of flavoring extracts have the same permit rights under Section 4 of the Act.

The defendants' answer to this is, as we understand their position, "that a permit to operate the denaturing plant carries with it the right to buy and sell ethyl alcohol and that the defendant (evidently intended for plaintiff) has continually bought and sold ethyl alcohol under and by virtue of its permit.

We are constrained to confess that we do not understand this branch of the defense. Its position at the tail end of the answer gives the impression of the afterthought of a mere make-weight comment. The real defense is that in the view of the defendants they may impose the time limit duration of a year upon all permits to produce the "articles" enumerated in Section 4.

This very question would seem to be the same sought

to be raised on the motion for a preliminary injunction disposed of in the decree of this Court under date of February 18, 1926. It is true that the defendants then conceded that upon the fact merits of the application for a permit the plaintiff had the right to one and that a decree requiring the permit to issue should properly be entered. They asked the Court to pass upon the abstract power of the Commissioner to adopt a regulation limiting permits in such cases to a year. It is likewise true that the Court refused to pass upon this question because it did not arise in the case, but the question would seem to be the same, and we are unable to discover in the answer anything more than the raising of the very question which has been ruled in the Del Mar case. It is always helpful in any discussion to have a frank avowal of what the real question under discussion is.

In the Ma-King and other cases the Courts have ruled in practical effect that on applications for original permits the Commissioner is called upon to exercise his executive or administrative judgment of whether a permit should issue, and upon the question of issue the Courts have granted him what is practically the right to exercise his discretionary judgment. After, however, a permit had been granted, the Commissioner can revoke it only in the manner prescribed by the Act of Congress, and the judgment there exercised is not an executive or administrative judgment, but is a judicial judgment, the basis of which is a fact finding. The defendants are strongly impressed with the value to them of the lawful power to exercise at least once a year an executive or administrative control over permits, so that they may escape the need to resort to a judicial fact finding. This is the very power, however, which we have held the defendants do not possess. If the permit here is one to manufacture or sell "liquor," no regulation limiting its operation to a year is needed, because Section 6 expressly so limits it by law.

The only question before us thus becomes whether the permit in question is the one permit or the other. This is in one view a question of law and in another view a question of fact. We assume the stipulation at bar to

include that the Court is to determine the character of the permit from the records which are before the Court. We begin with the application under date of January 15, 1924, which is an application for a permit to operate a denaturing plant under the provisions of Title III of the National Prohibition Act. This is followed by the issuance of a permit under date of October 7th, 1924, which authorized the operation of a denaturing plant, and incidentally, that it should continue until revoked in accordance with the law.

The ruling made is that the permit in question, so far as the rights of the permittee are concerned, is in the same class with the permits granted to manufacturers of the other "articles" enumerated in Section 4, and that, in consequence, the decree prayed for should be granted.

A formal decree is filed herewith.